

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

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PP Docket No. 93-253

To: The Commission

REPLY COMMENTS OF
THE COALITION FOR EQUITY IN LICENSING

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REPLY COMMENTS

The Coalition for Equity in Licensing (the "Coalition"),^{1/} by its attorney and pursuant to Section 1.415 of the Commission's rules, hereby submits its Reply Comments in the captioned proceeding.^{2/} For the reasons set forth herein, the Coalition reiterates its urging that the Commission not utilize auctions to license either pending RSA applications or pending unserved area applications.

^{1/} As the Coalition explained in its Comments in this proceeding, the Coalition is an unincorporated association composed solely of applicants having pending before the Commission cellular applications, either for Rural Service Areas ("RSAs") or for unserved areas (collectively, "Cellular Applications"). Accordingly, the Coalition and each of its members are interested parties in this proceeding. Attachment 1 to the Coalition's Comments is a listing of members of the Coalition.

^{2/} Notice of Proposed Rulemaking, PP Docket No. 93-253, 58 Fed. Reg. 53489 (October 15, 1993) ("Notice"). In the Notice, the Commission requested that comments be filed on or before November 10, 1993, and that reply comments be filed on or before November 24, 1993. Subsequently, the Commission extended the date for filing of reply comments to November 30, 1993. See Order in PP Docket No. 93-253, DA 93-1426, released November 23, 1993. Accordingly, these Reply Comments are timely filed.

I. Introduction

In its Comments, the Coalition concentrated solely on the Commission's possible use of auctions to license applications currently on file for cellular unserved areas and Rural Service Areas. The Coalition urged the Commission to license Cellular by lottery, rather than by auction. It explained why use of auctions to license these services would constitute an impermissible retroactive application of rule and law. The Coalition also explained why any reasoned consideration of the well-established standards that must be applied in assessing the permissibility of applying rules and law retroactively requires the Commission to apply auctions only prospectively. Finally, the Coalition reminded the Commission that it can license by auction only if the specific auction criteria set forth in the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") so permit, and that review of those criteria demonstrates that auctions should not be utilized to license Cellular applications.

II. Discussion

By the Coalition's count, approximately 180 parties filed comments in the captioned proceeding. At least two dozen of those parties addressed the issue of whether the Commission should auction currently pending cellular applications. The vast majority

of the commenting parties on this issue submitted comments wholly consistent with those filed by the Coalition.^{3/}

Perhaps the most significant fact associated with the comments is that not a single commenter proposed that auctions be used to license RSA applications. The Coalition submits that the total absence of controversy among the commenters on this point, coupled with the comments of the Coalition on this issue, serves to resolve any question with respect to how the Commission should license the remaining RSA markets.

Only a handful of commenters voiced a view different from the Coalition on the subject of unserved area applications. Those commenters are notable in that they include, or effectively represent, entities that have the financial wherewithal to outbid other pending applicants for unserved areas. They also stand out in that, for the most part, they are licensees that had an opportunity to file for the unserved areas but either elected not to do so within the five-year time frame established by the Commission, or simply overlooked that deadline. In any event, either by design or oversight, they let waste their opportunity to use what were exclusive rights to that spectrum.

The handful of commenters who argued for retroactive application of the auction authority failed to present any informed

^{3/} See, e.g., comments filed by Arch Comm. G.P., Inc.; John G. Andrikopoulos, et al.; Robert Lutz, et al.; Richard L. Vega Group; JMP Telecom Systems, Inc.; Small RSA Operators; Jeffrey Peterson; John Dudinsky, Jr.; Thomas J. Jasien; Jeffrey T. Bergner and The Coalition for Equity in Licensing.

basis for their position. They did not even deal with the focal issue of whether the retroactive application of law and policy is permissible. Nor did they address the multitude of criteria (e.g., minority and small business preferences, etc.) that must be met before the Commission could auction Cellular. For example, in otherwise lengthy comments, BellSouth Corporation ("BellSouth") devoted a total of only two paragraphs to this entire issue. BellSouth Comments, at 44-45. In that brief space, BellSouth simply reiterated the Commission's tentative view that auctions may be a way to deter "insincere applicants," without explaining why it concurs with that position or how it defines an "insincere applicant." Even so, BellSouth recognized that there is some need to make an "accommodation" to existing licensees in view of the switch from lotteries to auctions. Id.

Other commenters devoted even less attention to this important issue. CTIA devoted only a single, one-sentence footnote to the issue, in which it concurred that unserved area applications should be licensed via auction. CTIA Comments, at 31 n.78. Another pro-auction commenter, First Cellular of Maryland, Inc. ("First Cellular"), did not even expressly state that it supports auctions. Rather, it merely implied that auctions would be utilized, and concurred with the Commission's proposal to limit the opportunity to participate in the auction to those applicants who filed prior to July 26, 1993. First Cellular Comments, at 2.

The only known proponent of auctions for unserved area applications which appears even to have attempted to establish a

basis for its position is Bell Atlantic Personal Communications, Inc. ("Bell Atlantic"). However, Bell Atlantic devoted only three paragraphs to this issue, and its position appears to have been based upon a misguided belief that the Commission already "has decided" to use auctions to license those applications. Bell Atlantic Comments, at 22. Moreover, Bell Atlantic's argument reflects a fundamental misunderstanding of both existing and proposed rules for licensing of unserved areas. While Bell Atlantic parrots that use of auctions will provide the opportunity for a wider variety of applicants to become licensees, it ignores the fact that the Commission's proposal, which Bell Atlantic purports to support, would limit the potential applicant pool to those already on file and thereby preclude any opportunity for greater variety in licenses.^{4/} In addition, Bell Atlantic's professed concern over "speculators" overlooks the Commission's rules already in effect that prohibit any transfers of authorizations prior to build-out.

The paucity of analysis in the comments of auction proponents reflects not only the infirmity of their positions, but also the cursory treatment devoted to the issue of auctions. Advocacy of auctions was only one of many issues they discussed and,

^{4/} As a practical matter, use of auctions would considerably narrow the possible variety by effectively precluding from serious contention all but the most financially strong of the applicants.

apparently, it was not among the most important.^{5/} In any event, the comments of auction proponents stand in sharp contrast to the well-thought-out comments of several of the entities which expressed views consistent with those of the Coalition.

The Small RSA Operators, a group of entrepreneurs actively involved with the operation of small RSAs, quite properly pointed to the legislative intent of the Budget Act. It also presents a letter from Sen. Dianne Feinstein to support its arguments.

Another group, John G. Andrikopoulos, et al., also echoed the Coalition's position that the legislative history of the Budget Act demonstrates that Congress' intent was not to apply auctions retroactively. This group pointed to a Senate amendment to the budget legislation, which was incorporated by reference into the Conference Report, expressly stating that auctions should apply to licenses for new spectrum and should not alter existing spectrum allocation procedures.^{6/} The group also observed that it would be inappropriate and impermissible to apply auctions retroactively to one group of applicants (i.e., IVDS applicants) but not to another, similarly situated group, citing Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965). Finally, the group distinguished between the Commission's prior retroactive application of lotteries

^{5/} While First Cellular's comments focused only on unserved areas, a considerable portion of its comments addressed market definition and other non-auction matters that would have been more appropriately addressed in CC Docket No. 90-6, governing unserved areas generally.

^{6/} Comments of John S. Andrikopoulos, et al., at 6, citing 139 Cong. Rec. S7986, S7995 (daily ed. June 24, 1993).

(rather than comparative hearings) to cellular and its proposed retroactive application of auctions.

To state the obvious, the Commission's prior cellular action served to broaden opportunities for pending applicants and presented precious little new burden to applicants. Thus, it complied with the criteria set forth in Retail, Wholesale and Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Circuit 1972). In contrast, and as fully set forth by the Coalition in its Comments (at 5-11), retroactive application of auctions is precluded by any reasoned analysis of the governing criteria set forth in Retail.

III. Conclusion

For all the above reasons, the Coalition urges the Commission not to utilize auctions to license either unserved area applications or RSA applications. These applications were all filed before July 26, 1993, and Congress clearly intended that auction authority not be applied retroactively.

Even if the Commission determines that it has the discretion to license these long-ago-filed applications by auction, the Commission must comply with the criteria set forth in the Budget Act before determining to license in that manner. Review of the applicable criteria, as presented herein, demonstrates unmistakably that such licensing is contrary to the desire of Congress.

After having opened this entire proceeding to public comment, and having received approximately 180 comments, the Commission has received no meaningful support for utilizing auctions to license

either RSA markets or unserved area markets. To the contrary, a clear majority of the commenting parties has argued against retroactive application of the auction rules.

Respectfully submitted,

COALITION FOR EQUITY IN LICENSING

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